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No. 82-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SAVE THE VALLEY, INC.,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY

SUPPLEMENTAL APPENDIX CONTAINING ADMINISTRATIVE OPINIONS

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SUPPLEMENTAL APPENDIX

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 Courtland Street
Atlanta, Georgia 30308

Mr. Robert C. Somers
Assistant General Superintendent
Louisville Gas & Electric Company
P. O. Box 354
Louisville, Kentucky 40201

Dear Mr. Somers:

Review of your September 14, 1976, application for authority to construct an electric power generating plant has been completed. On the basis of this review, we have determined that the conditioned operation of the proposed plant at the specified location will not violate the Class II air quality increments specified in the EPA Regulations for Prevention of Significant Deterioration (PSD). Furthermore, we have determined that this plant will meet the Federal regulatory requirement under PSD that Best Available Control Technology (BACT) be used to limit emissions of sulfur dioxide and particulate matter.

A request for public comment regarding the preliminary determination on the above application was published on November 11, 1976. After consideration of the comments received, Authority to Construct a Stationary Source is hereby issued for the facility described above subject to the attached conditions, which are in accordance with the conditions detailed in the attached March 25, 1977, "Preconstruction Review and Final Determination for the Trimble County Generating Station Units 1, 2, 3, and 4 Proposed for Construction near Wises Landing, Kentucky". The Authority to Construct is based solely on the requirements of 40 C.F.R. 52.21, Federal regulations governing significant deterioration of air qual-

ity. It does not apply to NPDES or other permits issued by this agency or permits issued by other agencies. Additionally, construction covered by this Authority to Construct must be initiated within 18 months.

Please be advised that a violation of any condition issued as part of this approval, as well as any construction which proceeds at material variance with information submitted in your application, will be regarded as a violation of construction authority, and will be subject to enforcement action.

Authority to construct shall take effect on the date of this letter. The complete analysis which justifies this approval has been fully documented for future reference, if necessary. Any questions concerning this approval may be directed to Winston Smith, Chief, Trends Analysis and Program Coordination Section (404/881-2864).

Sincerely yours,

/s/ John A. Little, Deputy
JACK A. RAVAN
Regional Administrator

Attachments

Sep. 28, 1977

Mr. Robert C. Somers
Assistant General Superintendent
Louisville Gas & Electric Company
Post Office Box 354
Louisville, Kentucky 40201

Dear Mr. Somers:

On April 19, 1977 you were granted approval to construct a source subject to EPA's Regulations for Prevention of Significant Deterioration. This approval was based on criteria for review and approval contained in the EPA Regulations in effect at that time (40 CFR 52.21).

On August 7, 1977, President Carter signed into law the Clean Air Act Amendments of 1977 which significantly changed the Prevention of Significant Deterioration requirements. Major immediate changes include new air quality increments for SO_2 and total suspended particulate matter and designation of certain areas as Class I. Section 168(b) of the Clean Air Act as amended further states:

> . . . In the case of a facility on which construction was commenced in accordance with this definition after June 1, 1976, and prior to the enactment of the Clean Air Act Amendments of 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to the enactment of the Clean Air Act Amendments of 1977.

Sources which have not commenced construction by August 7, 1977, must meet the requirements of the new Amendments. Therefore, we are reviewing all previously granted approvals. This review will be to determine if construction has commenced prior to August 7, 1977, and, if it has not, to determine if construction meets the requirements of the new Amendments.

Our review of the final determination prepared for the Trimble County Generating Station indicates that the proposed construction may not meet the review requirements contained in the new Amendments. Therefore, our ap-

proval to construct is hereby voided until you demonstrate to our satisfaction that you commenced construction prior to August 7, 1977, or that the provisions of the new Amendments are met. The appropriate definition of "commenced" is contained in Section 168(2)(A) of the Clean Air Act as amended, and reads as follows:

> The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding arrangements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

If you had not commenced construction of this facility prior to August 7 you will have to re-apply to EPA for a new approval under the new requirements. If you wish us to reconsider your initial application without modification, you may so indicate in writing and provide one additional item of data: the height of the tallest facility adjacent to the stack(s) from ground level to roof peak. Be advised that the new Clean Air Act Amendments allow no credit for stack height beyond good engineering practice, generally two and one-half times building height.

If you have any questions concerning this matter please call Raymond Gregory/404-881-2864.

Sincerely yours,

/s/ John A. Little
Deputy Regional Administrator

JOHN C. WHITE
Regional Administrator

SMITH:cmb:9/22/77:2864

ENVIRONMENTAL PROTECTION AGENCY

Jan. 4, 1978

Mr. J. Gordon Arbuckle, Esquire
Patton, Boggs and Blow
1200 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Arbuckle:

This is in response to your letter of December 12, 1977, regarding the prevention of significant deterioration (PSD) pre-construction review, and final determination for the Trimble County Generating Station Units 1, 2, 3 and 4 near Wises Landing, Kentucky. In your letter you stated that a *de novo* review must be conducted by EPA, "with full opportunity for public comment on the Administrator's preliminary determination and on all information submitted by the applicant in connection therewith."

Our re-examination of the proposed Wises Landing facility was in order to determine if this source would meet the immediately effective PSD requirements of the 1977 Clean Air Act Amendments (P.L. 95-95). Our previous PSD approval of this source was suspended pending this re-examination since the company had not commenced construction prior to P.L. 95-95. The Company has proposed no material change to the construction that was approved earlier after public notice and comment. Consequently, we feel that a new comment period is not required.

However, we have decided that we will offer your client, Save The Valley, the opportunity to review and comment on the material we are looking at in our re-examination. Accordingly, on December 23, 1977, Mr. Cassidy of Save The Valley was notified by phone of this opportunity, and

of our willingness to let him inspect the relevant materials at our offices. On December 27, 1977, you were similarly notified. As tentatively discussed in those conversations, we will consider comments made by the close of business on January 13, 1977, in our re-examination.

If you have any questions, please call Winston Smith, Chief of our Trends and Analysis Section at (404/881-3043).

Sincerely yours,

G.T. HELMS, P.E.
Chief
Air Programs Branch

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 Courtland Street
Atlanta, Georgia 30308

January 18, 1978

Mr. Robert C. Somers
Assistant General Superintendent
Louisville Gas and Electric Company
Post Office Box 354
Louisville, Kentucky 40201

Dear Mr. Somers:

The review of the additional information you submitted on November 29, 1977, concerning your application for authority to construct the proposed Trimble County Generating Station has been completed. Our review has determined that the Prevention of Significant Deterioration requirements as modified by the Clean Air Act Amendments of August 7, 1977, will be complied with. This determination was based upon the additional information submitted resulting in the amended List of Conditions of Approval enclosed. This enclosure supercedes the conditions in the April 19, 1977 letter to you from Mr. Jack Ravan.

Please be advised that a violation of any condition issued in this amended List of Conditions of Approval, as well as any construction which proceeds at material variance with information submitted in your application, will be regarded as a violation of construction authority, and will be subject to enforcement action.

Any questions concerning this approval may be directed to Winston Smith, Chief, Trends Analysis and Program Coordination Section (404/881-2864).

Sincerely yours,

/s/ John C. White
JOHN C. WHITE
Regional Administrator

Enclosure

Feb. 17, 1978

Mr. J. Gordon Arbuckle
Patton, Boggs and Blow
1200 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Arbuckle:

This letter is to acknowledge receipt of your letter of January 13, 1978. For your information, approval to construct the Wises' Landing Power Plant was granted to Louisville Gas and Electric on January 18, 1978.

If you have any questions, please call (404/881-2854).

Sincerely,

G.T. HELMS, P.E.
Deputy Director
Air & Hazardous Materials
Division

cc: Smither
Cassidy
Phillips, ORC

Jan. 4, 1979

4R-LB

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Save the Valley, Inc.
c/o Mrs. George Clark, President
Hanover, Indiana 47243

Re: Request for Adjudicatory Hearing
Louisville Gas and Electric Company
NPDES Permit No. KY0041971

Dear Mrs. Clark:

I have completed my evaluation of your November 30, 1978, Request for Adjudicatory Hearing in accordance with Title 40, Code of Federal Regulations, Section 125.36, and Section 6.918. For the reasons set forth below, I have determined the request should be, and is hereby, denied.

It is my determination that your Request does not raise material issues of fact relating to the terms, conditions, and requirements of the NPDES Permit which was issued but, rather, appears to directly contest and challenge the PSD approval issued April 19, 1977 and the adequacy and substance of the Environmental Impact Statement issued for this facility on October 20, 1978.

The preliminary determination to issue a PSD approval for the Wise's Landing facility was announced on October 14, 1976. The Final PSD approval was issued on April 19, 1977. This final approval was subsequently reviewed in light of modified Prevention of Significant Deterioration requirements and it was determined these require-

ments would be complied with. Provision for the review of the PSD approval is contained in Section 307 and in Section 304 of the Clean Air Act; these sections specify both the time and proper forum for such review. Issues related to the air pollution potential and/or impact of the facility should have been raised under one or both of these provisions and are not appropriate issues for consideration in an adjudicatory hearing concerning an authorization to discharge pollutants to the waters of the U.S. issued under the National Pollutant Discharge Elimination System.

Similarly, issues involving the alleged failure of the Agency to comply with the requirements of the National Environmental Policy Act or the regulations of the Council on Environmental Quality in the preparation of the Environmental Impact Statement should be raised and tested in Federal District Court. Issues based on alleged inadequacies of the Environmental Impact Statement are not properly subject to consideration in an adjudicatory hearing unless directly related to the terms, conditions or requirements of the NPDES Permit.

In the absence of specific factual issues challenging specific NPDES permit provisions or stating specific NPDES permit provisions necessary to carry out the intent of the Clean Water Act, I have determined the requested adjudicatory hearing would not be an appropriate forum and should not be granted. However, while I have determined there are no factual issues which may be appropriately resolved in an adjudicatory hearing, I have not yet reached a decision on the propriety of referring certain issues of law to the Assistant Administrator for Enforcement and General Counsel in accordance with 40 CFR 125.36(m)(3). This decision will be made in the very near future and should I determine such a referral is necessary I will

establish an expeditious briefing schedule at the same time.

Sincerely,

/s/ John A. Little, Deputy
JOHN C. WHITE
Regional Administrator

cc: Secretary, Kentucky DNR&EP
Regional Hearing Clerk
J. Gordon Arbuckle
John L. Oberdorfer
Professor Harold G. Cassidy
Louisville Gas & Electric Co.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 4
345 Courtland Street NE
Atlanta GA 30303

Alabama, Georgia, Florida,
Mississippi, North Carolina,
South Carolina, Tennessee,
Kentucky

[SEAL] EPA

Jan. 8, 1979

REF: 4RC

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Save the Valley, Inc.
c/o Mrs. George Clark, President
Hanover, Indiana 47243

Re: Request for Adjudicatory Hearing
Louisville Gas and Electric Company
NPDES Permit No. KY0041971

Dear Mrs. Clark:

I am writing to inform you that I have reached a decision concerning the referral of issues of law raised in your November 30, 1978, Request for Adjudicatory Hearing to the Assistant Administrator for Enforcement and General Counsel in accordance with 40 C.F.R. § 125.36 (m) (3). For the reasons set forth below, I have determined that the request should be, and is hereby, denied.

It is my determination that any possible issues of law raised in your request and the January 5 follow-up letter are not properly the subject of the NPDES permit issuance process and review. It is my conclusion, based upon my review of the NPDES process in this case and your request and January 5 letter, that the allegations made against this Agency are based upon the PSD permit review process, as well as the Environmental Impact Statement (EIS) review process and not the NPDES process *per se*. As indicated in my letter to you dated January 4, 1979, I do not believe that the NPDES process can be or should be used to collaterally attack the PSD or EIS process.

My reasoning is further supported by the fact that your organization has been given ample opportunity to make its concerns known to this Agency with regard to both the PSD and EIS process. I am particularly concerned over Save the Valley's allegations that no opportunity was given the public to comment upon the proposed PSD approval and conditions.

Our records show that public notice requirements for the PSD permit were properly given under the then applicable regulations and that the time requirements for public reply were, in fact, extended as noted by letter from G.T. Helms, Deputy Director, Air & Hazardous Materials Division, Region IV, EPA, to your counsel, J. Gordon Arbuckle of Patton, Boggs & Blow, dated January 7, 1977. Moreover, any concerns you may have had with regard to the PSD permit should have been brought to EPA's attention pursuant to Section 304 and/or 307 of the Clean Air Act.

With regard to the adequacy of the EIS, I believe on behalf of EPA that it properly addresses all of your organization's environmental concerns within and without the arguable parameters of the NPDES permit. For this reason, I do not believe it to be in the best interests of the

public, judicial economy, and administrative economy to submit this NPDES permit to an unparalleled collateral review process neither required nor contemplated by the NPDES regulations. To the extent you may still take issue with the EIS, your concerns will have to be addressed to the appropriate judicial forum.

Sincerely yours,

/s/ John C. White
JOHN C. WHITE
Regional Administrator

cc: John L. Oberdorfer

May 8, 1979

REF: 4AH-AP

Mr. R. C. Somers, Manager
Cost and Planning
Assistant General Superintendent
Louisville Gas and Electric Company
P. O. Box 354
Louisville, Kentucky 40201

Dear Mr. Somers:

On October 16, 1978, you were notified by Winston Smith of this office that for each unit of the Trimble County Plant, which did not commence construction before March 19, 1979, our April 19, 1977, Prevention of Significant Deterioration (PSD) approval under 40 C.F.R. § 52.21 would be invalid.

Part of the definition of "commence" (40 C.F.R. § 52.21 (b)) requires that the owner or operator have "all necessary preconstruction approvals or permits . . .", including those required by the State Implementation Plan.

The Kentucky Division of Air Pollution Control has informed us that as of March 19, 1979, permits for Units 2, 3, and 4 have not been obtained. Therefore, the EPA Authority to Construct, which was issued April 19, 1977, and revised January 18, 1978, is invalid for Units 2, 3, and 4. Before construction on those units can begin, a new application, under the PSD regulations promulgated June 19, 1978, must be submitted to the Kentucky Division of Air Pollution Control and a permit issued by this office. The new application must comply with all the requirements of these new regulations and must consider current air quality and the consumption of air quality increments by all sources whose applications were submitted before the new applications for Units 2, 3, and 4.

If you desire further information concerning this matter, please write to Winston A. Smth, Chief, Air Programs Branch, or call him at 404/881-3043.

Sincerely yours,

/s/ John C. White
JOHN C. WHITE
Regional Administrator

RPfaff

OPINION OF GENERAL COUNSEL AT REQUEST OF PARTIES IN *SAVE THE VALLEY, INC.* v. *ENVIRONMENTAL PROTECTION AGENCY*, PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I. *Introduction*

This case involves the issuance of a new source NPDES permit to Louisville Gas and Electric Co. (LG&E) for a coalfired electric generating plant in Trimble County, Kentucky. During the permit proceedings, EPA's Regional Administrator, Region IV, denied Save the Valley's (STV) request for an adjudicatory hearing on the grounds that the issues STV raised dealing with the PSD permit and/or the inadequacy of the EIS were inappropriate in an NPDES proceeding. STV has challenged the NPDES permit in the Sixth Circuit on the grounds that the Agency's rules required it to grant the adjudicatory hearing. In the course of settlement talks it was proposed that the agency stay the permit and hold an adjudicatory hearing on all or some of STV's issues. At the request of the parties to the lawsuit, this opinion addresses the questions of whether the agency should hold an adjudicatory hearing, which issues are appropriate for consideration if such a hearing is held, and whether the NPDES permit should be stayed pending the completion of the adjudicatory hearing.

I have concluded that a hearing should be held, on issues and under conditions set forth below, but that the permit should not be stayed. The reasons for this conclusion are set forth below.

II. *The Granting of the Hearing*

At the threshold, I note that the Regional Administrator's denial of the adjudicatory hearing request was based on a misunderstanding of the law. In his letters to STV on January 4 and 8, 1979, the RA stated that issues deal-

ing with NEPA were outside the permissible scope of an NPDES hearing and would have to be addressed in District Court. Under § 511(c)(1) of the CWA, the environmental impact statement requirements of NEPA are applicable to new source NPDES permits issued by EPA. Thus, under basic NEPA law, no decision can be made to issue a permit until a legally sufficient EIS has been prepared and considered by the decisionmaker. Thus, the adequacy of the EIS may raise material issues relating to the issuance of the permit. Under EPA's regulations, adjudicatory hearings are available (upon proper request) to contest such matters considered by the decisionmaker. 40 C.F.R. § 6.918 provides:

> § 6.918 Decision on the Federal action.
>
> The responsible official shall issue, issue and condition, or deny the new source NPDES permit following a complete evaluation of any significant beneficial and adverse environmental impacts on the human environment consistent with Federal, State, or local requirements outlined in section 6.910 above. The applicant or other interested party may seek an adjudicatory hearing or other judicial review of the responsible official's decision pursuant to 40 CFR 125.36.[1]

Since the issues which STV raises are prima facie material, as required by the NPDES regulations, the question to be considered now is whether there is any other reason why an adjudicatory hearing would be inappropriate.[2] The basic reason offered by LG&E against the holding of an adjudicatory hearing is that none of the

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[1] While this specific language was eliminated in the June 7, 1979 changes in the NPDES regulations, there was no change in the need to consider the EIS or the scope of the hearing available upon request.

[2] I note that the original request contained all the information required under 40 CFR 125.36(b).

issues presented in the Joint Motion[3] is appropriate for an adjudicatory hearing. More specifically, LG&E argues that each of the issues is barred because it is an improper attempt to relitigate a matter because it should be reserved for another forum, or because it was not raised in a timely fashion.

First, LG&E argues that certain issues are barred by res judicata and/or collateral estoppel in that they were or could have been adjudicated in prior proceedings. Under the doctrine of res judicata, the cause of action in the two cases must be the same. It is clear that the prior PSD and PSC proceedings do not meet this requirement. The purpose of the PSD proceeding was to ensure that emissions from the facility would not violate specified numerical standards for ambient air quality or prevention of significant deterioration and would meet a limitation for certain pollutants representing best available control technology (BACT). The purpose of the PSC proceeding was to determine whether a certificate of convenience and necessity and a certificate of environmental compatability should issue under Kentucky law.[4] NEPA's goal is to ensure that all environmental impacts are considered in the project decision, whether or not these impacts pass other statutory hurdles.[5] As the court noted in *Calvert Cliffs Committee* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971):

> [Other agencies'] certification does not mean that they found no environmental damage whatever. In

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[3] Draft "Joint Motion for Order Dismissing Action Pursuant to Agreed Terms," Appendix A. I note that some of the issues listed in Appendix A have been reworded since LTV's original request. My decision that a hearing would be appropriate is based on consideration of the issues as they appear in Appendix A.

[4] The PSC proceeding was conducted by the Kentucky Public Service Commission.

[5] While § 511(c)(2) of the CWA prohibits the imposition of effluent limitations more stringent than those developed under the CWA, the CAA does not have an equivalent provision.

> fact, there may be significant environmental damage . . . but not quite enough to violate applicable . . . standards . . . It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweight the particular economic and technical benefits involved in the planned action at 1123.

Each statute involves its own balancing of a particular set of factors and has its own purposes. Thus, even under the "flexible" approach advocated by LG&E, I find that the causes of action in the earlier proceedings are not the same as the cause of action in the NPDES proceeding, and that therefore, the doctrine of res judicata should not be applied to limit issues in the NPDES proceeding. Moreover, uner the doctrine of res judicata, the prior proceeding must have been judicial in character. The notice and comment procedures of the PSD proceeding do not meet this requirement. (See 40 CFR § 52.21(r)).

LG&E also argues that a number of issues should be barred under the doctrine of collateral estoppel. The doctrine of collateral estoppel applies only to those issues which were actually decided in a prior proceeding. Although LG&E has argued that many of the present issues were raised in the PSD and PSC proceedings, it has not shown that they were necessarily decided or that findings were made. (LG&E brief, p. 41-42, lists only two issues on which Kentucky allegedly made findings—(g) and (h).) As Professor Davis notes, "The party asserting collateral estoppel has the burden of showing that issues are identical and that they were determined on the merits in the first proceeding." *Administrative Law* § 18.12 (1958 Ed.)). In addition, as in the case of res judicata, the earlier proceeding must be one in which the agency was acting in a quasi-judicial capacity. For the latter reason alone, collateral estoppel should not be applied to PSD notice and comment proceedings.

LG&E sugests that EPA ought to bind itself to follow Kentucky's PSC public necessity and convenience decision, out of deference to the public system. With all due deference to Kentucky, this agency cannot bind itself to another agency's value judgments, *cf. Calvert Cliffs.*

LG&E also argues that certain issues should be dealt with generically, through past or future rulemaking, rather than on a case-by-case basis. This argument must be rejected as far as it relates to future rulemaking. If a subject is relevant under NEPA and the CEQ guidelines, it should be considered in connection with a major federal action like a NPDES permit issuance. The mere fact that the agency expects to deal with the subject generically does not excuse it from ignoring the subject in the meanwhile. *NRDC v. NRC (Vermont Yankee)*, 547 F.2d 633, 641 (D.C. Cir.)

For example, LG&E suggests that solid waste issues need not be considered in the EIS because RCRA regulations will deal with the subject (see issues I, J, K, L, and M in appendix I). While the EIS cannot be expected to anticipate what standard those regulations will set for the disposal of power plant solid waste, that is not a release from the obligation to discuss the subject.

The question of the impact of existing rules on a NEPA decision is more difficult. No across the board "yes" or "no" can be given. NEPA does not require an agency to ignore everything it has learned in the past; it merely ensures that past learning will be supplemented or updated as appropriate. Accomplishing this depends on a careful analysis of what the scope of the rule is, what considerations it purports to have incorporated, whether the rule invalidates certain procedures or merely validates them, and how the scope of the NPDES issues compares to the scope of the rule. It may well be that the rule limits the scope of the issue, or sets up certain rebuttable presumptions. Because of the number and com-

plexity of the issues and rules involved and the limited briefs submitted by the parties, I feel that it will be more appropriate to allow the presiding officer to determine whether any of the issues should be barred or curtailed because of existing regulations.

LG&E also argues that three issues were not raised before the request for a hearing. While a rule strictly imposing such a requirement has been incorporated into the new NPDES regulations (40 CFR § 124.76), these regulations were not in effect when the hearing request was made. In any case, at most three out of 23 issues are involved, they are limited in scope, and they are not likely to delay the proceeding significantly. Therefore, I conclude that there is no firm basis for denying a hearing on the grounds of timeliness.[6]

Finally, LG&E also argues that the appeals section of the CAA, § 307, bars consideration of anything that was or could have been raised in the PSD proceeding, because it sets up the sole avenue for challenging the issuance of a PSD permit. However, since STV's issues are directed at the adequacy of the EIS and their resolution in this context will have no bearing on the validity of the PSD permits, § 307 is irrelevant.

In sum, it appears that at least some of the issues raised by STV are appropriate for hearing under EPA's NEPA obligations. Since the Regional Administrator erred in denying an adjudicatory hearing, I conclude that the agency should hold an adjudicatory hearing, as soon as practicable, to comply with NEPA and our regulations.

While I sympathize with LG&E's desire not to engage in duplicative proceedings and while the agency certainly does not want to waste its resources in that manner, the

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[6] This conclusion is not based on *Pacific Legal Foundation v. Costle*, relied on by STV. The agency disagrees with this decision and has appealed it to the Supreme Court.

traditional doctrines of collateral estoppel and res judicata do not provide an adequate basis for altogether denying an adjudicatory hearing. However, as discussed below, the fact that there have been prior proceedings may play a role in the ALJ's assessment of whether certain sections of the EIS are reasonably complete and reliable.

In addition, I note that the practical problems presented by this case should be less frequent in the future. Under the proposed consolidated permit regulations (June 14, 1979, 44 FR 34244) PSD, NPDES, and RCRA permit hearings may be consolidated. In the meanwhile, to simplify matters in the instant case, I direct the trial staff to offer in evidence the record of the PSC and PSD proceedings. At the minimum this should eliminate disputes over what was actually at issue and eliminate the need to prepare new testimony and exhibits. Finally, I stress that even if the ALJ should find that the EIS was inadequate or that the NPDES permit should be modified, such finding will not affect the validity of the PSD permits.

III. *Issues on Which a Hearing is Granted*

A. Preliminary Remarks

At the time STV requested an adjudicatory hearing in these proceedings, the applicable regulations defining the right to a hearing and its appropriate scope, and the procedures for the hearing were those apearing at 40 CFR Part 125 and 40 CFR Part 6. Since that time, EPA has promulgated new NPDES regulations which make some changes in the hearing process. These new regulations have an effective date of August 13, 1979. The two sets of regulations set out essentially identical standards for granting a request for a hearing—that is, that the request have a certain degree of specificity and that it set out "material issues of fact." (§ 125.36(c)(3) under the

old regulations and § 124.75(a) under the new ones).[7] However, the two regulations provide different mechanisms for dealing with legal questions and certain other aspects of the hearing itself. Under the old procedures, legal questions were not to be considered at the adjudicatory hearing, but rather were certified to the General Counsel, whose opinion was binding on the Regional Administrator (who made the initial decision based on the record certified by the Presiding Official). § 125.36(m). Under the new procedures, the Presiding Official decides legal issues as well as factual issues in an initial decision. The parties have apparently assumed that the earlier procedures would apply here. However, under § 124.135(b) the new hearing rules apply to any adjudicatory hearing the notice of which is given 60 days after issuance (June 14, 1979). This is consistent with the general principles that regulations which become effective during the pendency of administrative proceedings control those proceedings, unless injustice would occur (see preamble discussion of Section 124.86(c) of the new rules). Thus, I conclude that the new NPDES procedures should apply to the hearing to be conducted in this case. Therefore, in considering the appropriateness of issues for the hearing, I have not distinguished between factual and legal questions or specified the latter for a legal decision, as would have been required under the previous rules. The Presiding Officer should conduct the hearing and render his initial decision in accordance with the procedures in Subpart H of the new rules. This new approach should result in a more expeditious proceeding, benefitting both LG&E and STV.

In designating issues for the hearing, I have followed a principle of liberality, that is, giving the benefit of the doubt towards inclusion, in light of the fact that the Pre-

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[7] As noted above, the request contained all the required information and the only dispute concerns the appropriateness of the issues themselves.

siding Officer will have the authority and responsibility to clarify and refine the issues at trial (§§ 124.83(c)(1) and 124.85(b) of the new rules.) In the case of certain issues which involve both fact and law, it is possible that a legal ruling will obviate the need to consider evidence. As explained above, the adequacy of the EIS is material to the issuance of the permit. However, in narrowing the issues, the Presiding Officer should consider whether each of STV's issues is really material to the adequacy of the EIS and, if so, whether the appropriate means of clarifying it is a legal decision, submission of written materials, oral proceedings, or some other means.

It is well settled that a test of reasonableness must be applied in determining whether the discussions of alternatives and other issues in an EIS is adequate. *NRC* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972). "A 'rule of reason' is used to ascertain those effects anticipated." *Carolina Environmental Study Group* v. *United States*, 510 F.2d 796, 798 (D.C. Cir. 1975). The fact that an issue has previously been debated in another proceeding may well mean that it was reasonable for the EIS to rely on the conclusions or findings of that earlier proceedings. In such a circumstances, in order to meet its burden under § 124.85 of coming forward with an affirmative case on its claim, STV must show either that on its face the prior finding does not reach the full range of NEPA concerns or that it was unreasonable for the EIS to rely on the prior finding, e.g., because of new facts not considered in the earlier proceeding. Such an approach will give a strong, but rebuttable presumption to findings in prior proceedings and therefore screen the more serious objections from those that are "overly technical and hypercritical", to use the words of the Sixth Circuit in *EDF v. TVA*, 492 F.2d 466 (6th Cir. 1974).[8]

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[8] Contrary to STV's contention in its brief, *Calvert Cliffs* does not hold that an agency must ignore all prior findings. Rather it stresses that such findings may not address all environmental

B. The Issues

Each of the issues identified in the Joint Motion is hereby referred to the Presiding Officer to be appointed, who may eliminate, limit, or clarify any or all of them in accordance with the preceding discussion.

However, I am directing that only issues raised by the construction of units 1 and 2 be considered. These units can function independently of units 3 and 4. Also, the progress of units 3 and 4 is less advanced. Since the PSD permits for the latter units have expired, and will have to be reissued, the possibility exists for combining the public hearing on the new PSD permits with a panel hearing under EPA's new NPDES procedures. This would appear desirable as a matter of policy.

IV. *Stay Pending Hearing*

Under EPA's NPDES regulations, EPA cannot stay the effectiveness of a permit after the permit has become final. These regulations recognize the well-established policy of finality. (See, *CAB* v. *Delta Airlines*, 367 U.S. 316 (1961)). While STV cites § 125.36 in support of EPA's authority to stay, that section is on its face limited to certain circumstances not present here.

STV also argues that EPA has "inherent authority" to stay a permit to correct an agency mistake. However, assuming such authority, there must be a compelling reason to disregard the agency's regulations. It is hornbook law that an agency must ordinarily follow its own procedures and that an action may be set aside if not in conformance with applicable regulations. (*United States* ex rel *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Serv-*

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costs or may use a different balancing test, and therefore that reliance on such findings does not relieve the decisionmaking agency of its obligation to balance the whole panoply of environmental costs against the project benefits.

ice v. Dulles, 345 U.S. 363 (1959); *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342 (D.C. Cir. 1965).)

In the present case, STV has failed to establish a compelling reason to disregard the NPDES regulations. NEPA does not compel a stay of construction[9] pending correction of an EIS which has been determined to be inadequate. *Ohio v. Calloway*, 497 F.2d 1235, 1240 (6th Cir. 1974), *EDF v. Froelke*, 348 F. Supp. 338 (W.D. Mo. 1972), aff'd 477 F.2d 1033 (8th Cir. 1973), *Sierra Club v. ICC*, (D.C. Cir.), 1978 F. Carr. Cas. p. 82, 768 (Feb. 21, 1978). Where, as in the instant case, it has merely been alleged, but not yet decided, that the EIS is inadequate in any material respect, there is even less requirement for a stay.[10]

Moreover, it appears from the pleadings and the uncontested portions of the EIS that the major adverse environmental impacts will not occur until the facility begins operations. At this time, there is no reason to believe that the facility will be operating before the end of the hearing. Moreover, the PSD permits for units 3 and 4 have expired, so that even if operations were to begin, the impacts would be less than originally estimated. Most of the impacts alleged by STV are subject to continuing (and, if necessary, tighter) control by EPA under various regulatory statutes, another factor making for diminished impact. Thus, if the permit is ultimately

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[9] STV has not controverted LG&E's claim that a stay of the permit effectively would halt construction.

[10] *Concerned Citizens of Bushkill v. Costle*, (3rd Cir., Jan. 9, 1979), cited by STV, is distinguishable. In that case, EPA had not prepared any EIS; when that was challenged, EPA, the grant recipient, and the environmental plaintiff entered into a stipulation that EPA would not continue to process the grant until the District Court could consider the merits of the NEPA claim. Later, the trial court postponed the date over the recipient's objection, prompting an interlocutory appeal. What the Court of Appeals held was that the trial court did not abuse its discretion in postponing the trial.

denied, little additional harm will have occurred because of the lack of a stay. On the other hand, if a stay were granted and if the final decision is to issue the permit, there will have been expensive delays in a needed project. (A decision to issue would imply a conclusion that the project was needed.)

Finally, given the degree of judgment involved in assessing the adequacy of an EIS, the fact that the role of the EIS is one of education via full disclosure, rather than mandating particular decisions, and the fact that a private, not a Federally funded, project is involved, STV has not established a likelihood that it will succeed in getting the permit reversed.

My conclusion is not inconsistent with the agency's stay of an issued permit in *Bethlehem Steel*, (STV brief p. 42). That stay was issued 5 days after final action and was apparently with the approval of the permittee.

For all the above reasons, I conclude that the permit should not be stayed pending the hearing.[11]

/s/ Joan Z. Bernstein
JOAN Z. BERNSEIN
General Counsel

Dated: August 16, 1979

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[11] However, all parties are urged to conduct the hearing expeditiously. It is clearly in STV's interests to do so. It should equally be in LG&E's interest to have the question of the permit resolved before it commits much more resources, particularly since investments since the completion of the EIS should have little or no weight in any subsequent reassessment of reasonable alternatives to the project as proposed.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Washington, D.C. 20460

Office of the Administrator

NPDES No. KY0041971

IN the MATTER of

NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM PERMIT for

LOUISVILLE GAS & ELECTRIC COMPANY
TRIMBLE COUNTY POWER PLANT

ORDER AND INITIAL DECISION

This matter is before me on a motion for a summary determination and elimination of issues by the permittee, Lousiville Gas and Electric Company (hereinafter LGE), pursuant to 40 C.F.R. § 124.84. The requestor, Save the Valley, *et. al.* (hereinafter STV), replied to the motion and filed a cross-motion for summary determination as to certain issues. The Environmental Protection Agency (EPA) also filed its responses and essentially sought a summary determination on the issues in accordance with those sought by LGE.

FACTUAL BACKGROUND

In April of 1975, LGE applied to EPA for a National Pollutant Discharge Elimination System (NPDES) permit for Trimble County Units 1 through 4, pursuant to § 402 of the Clean Water Act, 33 U.S.C. § 1342. STV was a particpant in various proceedings instituted by EPA, including, but not limited to, a public hearing in the town of Bedford, Trimble County, Kentucky. Following the preparation of a draft Environmental Impact Statement (EIS), the Kentucky Department of Natural Resources

and Environmental Protection and EPA conducted a joint hearing in Bedford to receive comments from the public on the draft EIS.

On April 19, 1977, EPA issued a Prevention of Significant Deterioration (PSD) permit to LGE for the Trimble County Generating Station. This final action was subject to judicial review set out in § 307(b) of the Clean Air Act, i.e., within 60 days.

On April 27, 1978, LGE filed an Application with the Public Service Commission of Kentucky (now the Kentucky Energy Regulatory Commission) for a Certifcate of Public Convenience and Necessity and a Certificate of Environmental Compatibility. Pursuant to Kentucky statutes (K.R.S. 278.025), the Kentucky Department of Natural Resources and Environmental Protection reviewed the environmental aspects of the Company's proposed plan and approved the same. STV participated in a two-day adversary public hearing before the Kentucky Public Service Commission on LGE's need for Trimble County Generating Stations 1 and 2 and its enviromental affect. The Commission found Generating Units 1 and 2 would be needed by their expected completion dates and issued a Certificate of Convenience and Necessity and a Certificate of Environmental Compatibility on October 20, 1978. STV's *et. al.* appeal is pending.

On November 28, 1978, a final NPDES permit was issued to LGE. STV duly requested an adjudicatory hearing and legal decision from the Regional Administrator. Its request was denied on January 7, 1979. STV sought no further administrative review (it did not exhaust its administrative remedies) by appealing to Mr. Douglas Costle, the Adminstrator. Rather STV filed a petition to review the NPDES permit in the United States Court of Appeals for the Sixth Circuit (*STV v. Costle*, No. 79-3058). LGE intervened. Also, on January 19, 1979, STV filed a companion case in the United States District Court for the District of Columbia (*Save The Valley v. Costle*,

Civil Action No. 79-0214). This latter case has now been dismissed by STV.

In February of 1979, STV began extended discussions with the Government in which it sought to convince EPA and the Justice Department that EPA had erred in not granting STV an adjudicatory hearing. LGE was not invited to participate in these discussions.

On July 19, 1979, at the request of LGE, counsel for EPA, STV and LGE met in the Office of the General Counsel (OGC) of EPA to discuss and settle the then pending litigation as to (1) whether STV should be granted a hearing and (2) if so, on what issues, and (3) whether EPA should stay LGE's NPDES permit. Briefs were filed.

On September 5, 1979, approximately eight months after STC filed its action in the Sixth Circuit and approximately eight months after construction of the Trimble County plant began, STV moved the Sixth Circuit for a stay of the effectiveness of the NPDES permit. The motion was fully briefed by both sides and the Sixth Circuit refused to grant STV's motion.

Approximately ten days after the denial of the motion for reconsideration, STV filed an action in the U.S. District Court for the District of Columbia (*STV v. Douglas Costle*, No. 80-0930) seeking an injunction against further construction of the Trimble County plant. LGE intervened. The factual allegations in the complaint have been denied by affidavits of engineers of LGE and EPA. STV made a motion to take certain depositions. LGE has opposed these motions and has filed its motion seeking to dismiss the case on jurisdictional grounds. The motions are pending before the Court.

On August 16, 1979, EPA's OGC issued an opinion on this matter which held, in essence, that EPA Region IV erred in refusing to grant an adjudicatory hearing to STV on its initial request filed in November of 1978 and

that an opportunity for such a hearing be granted. The OGC also ruled that since the permit was a final permit its provisions would not be stayed pending final Agency action following the hearing procedures. On July 16, 1980, the Sixth Circuit Court of Appeals issued an order which denied STV's request for a stay of the permits involved and held that the air permit (PSD) granted to LGE was a valid one. The Court adjourned the proceedings but kept the case on its active docket pending administrative action within EPA.

The request for hearing filed by STV raises twenty-three (23) issues all relating to the adequacy of the EIS prepared by EPA prior to issuing the subject NPDES permit. Following Public Notice of the granting of the adjudicatory hearing, the following persons and entities were admitted as parties either by the Regional Administrator or myself:

1. Louisville Gas and Electric Company,
2. Trimble County Water District No. 1,
3. Dr. Harold Cassidy, and
4. The City of Bedford, Kentucky.

Since this matter involves the adequacy of an EIS rather than the traditional issues normally associated with a hearing involving an NPDES permit, I solicited from the parties memoranda of law on the scope of my review. They filed their responses which I have carefully reviewed and will discuss later.

On August 27, 1980, LGE filed a motion for summary determination on and elimination of all the issues raised by STV. A pre-hearing conference was held on September 9, 1980 in Louisville, Kentucky. At this pre-hearing conference, STV indicated that they intended to file no direct testimony, but rather would make their case by cross-examining EPA witnesses who helped prepare the EIS. EPA also filed a motion to consolidate the twenty-three

(23) isues raised by STV into four (4) broadly stated issues which they urged encompassed all the issues raised by STV. The parties were directed to respond to this motion as well as the motion for summary determination previously filed by LGE. LGE was given fifteen (15) days to reply to these pleadings. Further, all parties except EPA and LGE were consolidated for procedural purposes.

During the pre-hearing conference, I expressed my concern about STV's assertion that it would present no direct testimony. In that context, I suggested to STV that, in its brief, it identify with specificity those portions of the EIS which it felt were inadequate and if possible make statements, in the nature of an offer of proof, as to what facts it intended to bring out in cross-examination which would support its argument of inadequacy.

Following the granting of several extensions of time, the parties have filed all their required pleadings and briefs, and the matter is now ripe for decision. In its reply and motion, STV did not take a firm position on EPA's motion for consolidation of the twenty-three (23) issues into four (4), but stated that for purposes of their brief, they were seeking a summary judgment on Issues 1, 3 and 4* as proposed by EPA. They stated that the reason for not taking a position on EPA's motion was that they did not know which of their issues the consolidated issues intended to include and which it intended to eliminate. My direction to the parties on this point was not to speculate as to EPA's intent, but rather tell me

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* They are: (1) Whether the EIS is supported by adequate air quality modeling analysis and properly considered air quality impacts which could be reasonably anticipated to result from the Trimble County project? (3) Whether the EIS adequately considered alternatives to the construction of the Trimble plant as planned, including the no-construction alternative? and (4) Whether the EIS adequately considered the environmental impacts of the proposed disposal method of sludges from the flue gas desulfurization devices?

which of the twenty-three (23) issues were not, in fact, included in EPA's consolidation. Since STV were the authors of the original twenty-three (23) issues, I felt that they were the logical party to tell me the effect of the EPA consolidation. I regret that they did not do so.

SCOPE OF REVIEW

As indicated above, the parties, at my request, provided briefs on the question of the scope of my review of this case. I sought the guidance of the parties in this regard because this is a case of first impression for the Agency in that it involved an appeal of the issuance of an NPDES permit wherein no issues as to the terms of the permit were raised. The requestors in this case only raised issues concerning the adequacy of the final EIS issued in conjunction with the permit. Although the issuance of most NPDES permits are expressly exempted from the provisions of the National Environmental Policy Act (NEPA)[1], the issuance of an NPDES permit to a "new source", as that term is defined in the Act, is subject to the procedures mandated by NEPA.

NEPA, which was enacted in 1969 and became effective in January of 1970, set forth a broad policy statement which exhorted the Nation to:

> Fulfill each generations responsibility as environmental trustee for the next;
>
> Assure for all Americans esthetically and culturally pleasing surroundings;
>
> Obtain the widest range of beneficial uses of the environment without risk to health or safety;
>
> Maintain, where possible, an environment which supports diversity and variety of individual choice;

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[1] 42 U.S.C. §§ 4321-4361.

Maintain population levels so that life's amenities may be widely shared; and

Approach the maximum recycling of renewable resources.[2]

Whether viewed as ambitiousness or hyperbole, the eloquence of the above-cited substantive portions of NEPA appears to have led ultimately and ironically to their unenforceability. Though laudable as national objectives, they do not translate readily into usable standards of review.

The meat of NEPA appears to reside in § 102(2)(c) which requires that Federal agencies prepare an EIS before embarking on "major Federal actions significantly affecting the quality of human environment".[3] The Act then proceeds to require the responsible Federal official to prepare a detailed statement (EIS) on:

"(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

Most courts have held that NEPA is primarily a "procedural statute" and although plaintiffs have had considerable success in challenging agencies' noncompliance with the law's procedural dictates, specifically with re-

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[2] 42 U.S.C. § 4331(b).

[3] 42 U.S.C. § 4332(2)(c).

spect to the preparation of EIS's, there is an absence of a single plaintiff's victory in a "substantive NEPA case".[4]

What this all means is well stated in the case of *Vermont Yankee Nuclear Power v. N.R.D.C.*, 435 U.S. 519, which held that NEPA, while establishing "significant substantive goals for the Nation", imposes upon agencies duties that are "essentially procedural". That is to say the NEPA was designed "to insure a fully-informed and well considered decision", but not necessarily "a decision the judges of the courts would have reached had they been members of the decision making unit of the Agency".

Consequently, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has *considered* the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of action to be taken". *Kleppe v. Sierra Club*, 427 U.S. 390. In other words, the court should not substitute its judgment for that of the Agency as to the environmental consequences of its actions. An agency had *considered* the environmental consequences of its action if it has taken a "hard look" at them. *Kleppe v. Sierra Club*, *supra*. In determining whether or not an agency had in fact given these consequences the required "hard look", the courts have adopted the "arbitrary and capricious standard" within the meaning of the Administrative Procedures Act (APA), *Overton Park v. Volpe*, 401 U.S. 402, 413-414.

Thus, the scope of review applicable to Federal courts is clear. What is not clear is what my scope of review is. The primary reason the courts have developed this standard of review is that Congress has left to the various agencies the power to make policy decisions and exercise discretion based upon their expertise and knowledge involved in administering the statutory program in question.

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[4] Council on Environmental Quality, Env. Quality 1978 at 409.

As an Administrative Law Judge (ALJ), am I the Agency? Do I possess this expertise? May I substitute my judgment for that of the Agency? I think not. It is apparent that the Agency, in promulgating the regulations giving persons a right to a hearing on NEPA and EIS issues, have not thought the process through. No agency policy or regulation provides guidance on this question. Logic, however, would tend to dictate the futility of my reviewing final Agency action on a *de novo* basis, making independent determinations concerning whether a particular environmental consequence is so heavy as to outweigh any benefits, when a court will review my decision and that of the Administrator using a totally different standard. This is particularly true since I am, in essence, reviewing a final Agency action for which a full record exists. This record being the Administrative Record which includes the Draft and Final EIS, as well as the PSD and Public Service Commission (PSC) records developed elsewhere.[5]

Accordingly, I am of the opinion that my scope or standard of review for this case will follow that established by court decisions relevant to NEPA. I will take a hard look at the Agency's hard look and apply the arbitrary and capricious standard of the APA. If I am in error in this conclusion, I am sure the Agency will so advise and perhaps establish some guide posts to help my colleagues find their way along this uncharted trail.

THE ISSUES

I will first consider Issue No. 1, identified above, which has to do with EPA's choice of a particular air quality model to evaluate the air quality impacts of the proposed Trimble County project.

In assessing air quality impacts of the proposed facility, EPA, in the Draft EIS, utilized the single source

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[5] See OGC Opinion at 9 and my Order of September 19, 1980.

CRSTR model assuming a four-boiler unit with full load operation and a ninety (90) percent scrubber efficiency. Annual average SO_2 concentrations were obtained in runs of the Uneven Terrain (valley) Diffusion Model. Both annual and short term projected SO_2 concentrations were found to be well below the established standards. (See p. 6-40 Draft EIS Vol. II.)

Use of this model was criticized at the public hearing on the Draft EIS and in response to this concern, EPA made several changes in models and methodology used to predict the impact of the proposed plant. One of the criticisms had to do with the limitations of the CRSTR model, originally used, to assess the interaction of the proposed source's emissions with that of the existing Clifty Creek plant at Madison, Indiana. Accordingly, the EPA remodeled this interaction using a multi-source CRSTR model. This remodeling effort confirmed the findings of the Draft EIS that no violation of air quality standards would occur. (See EIS 2-1.)

Despite this effort by EPA in remodeling using a more complex model, STV argues that they should not have used the CRSTR model at all, but rather a newer model developed by TEKNEKRON for the Ohio River Basin Energy Study ("ORBES"). STV states that the TEKNEKRON model, which was specifically developed for the Ohio Valley, is the preferred technique and that EPA's failure to use it, fatally flaws the EIS.

This concern was addressed in the EIS at p. 2-2 wherein the EPA responded that, although well aware of the existence of the new TEKNEKRON model, it does not use *unvalidated* models in a site specific EIS on a proposed project for which the Agency has regulatory authority. There is no evidence in the record nor has STV pointed to any evidence elsewhere that the results to be obtained using the TEKNEKRON model would be any different or more accurate than those developed by using the CRSTR model. Thus, their arguments in this regard are pure

speculation. A similar argument was made in *Sierra Club v. Morton*, 510 F.2d 813 (1975), which involved the proposed leasing of 147 tracts on the outer continental shelf along the coasts of Mississippi, Alabama, and Florida for oil exploration. The Sierra Club argued that the matrix analysis used by the Secretary of Interior to predict possible adverse impacts from oil spillage was insufficient as compared to procedures identified in a CEQ report on oil development in the Gulf of Alaska and the Atlantic Coast. In dismissing this argument, the Court held that:

> "Interior's decision to project possible environmental damage from all tracts by the matrix approach, as opposed to the use of a more detailed analysis for a few select sensitive points, certainly does not evince a lack of good faith effort to afford the decisionmaker with the necessary quantitative information concerning the potential impact of oil spillage. Because no exact data exists until a spill occurs at a given location, any analysis of future oil spillage involves a degree of speculation. Therefore, every attempt to select quantitative values will be to some extent arbitrary. The use of relative proximity and importance scales to project adverse environmental impacts from all tracts is no more arbitrary than CEQ's selection for analysis of 23 specific points out of the vast Atlantic Coast and Gulf of Alaska area they analyzed."

Clearly the Agency's policy of not using unvalidated models is a reasonable one. The use of untested methodology in making decisions as critical as the one involved in this case would be likely viewed as imprudent . As the Court held in *Vermont Yankee*, supra:

> "But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free

> to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."' *FCC v. Schreiber*, 381 U.S., at 143, 60 S.Ct., at 441. Indeed, our cases could hardly be more explicit in this regard."

In view of the above, I find that EPA's use of the CRSTR model in preference to the TEKNEKRON model was a valid exercise of Agency discretion and was clearly not arbitrary or capricious. *Cleveland Elec. and Illuminating Company v. EPA*, S72 F.2d 1150 (1978). This is especially true in light of the fact that the EIS fully considered the entire matter and gave it the hard look required by law.

NEED AND SITING ISSUE

Issue No. 3 involves the extent to which the EIS considered alternatives to the construction of the Trimble Plant, including the no-construction alternative. STV argues that the EIS overestimates the growth in electricity demand and as a result ignores siting alternatives.

It should be noted that the EIS was prepared on the assumption that four (4) units would be constructed at the site. It now turns out to be the case that only two (2) units are to be immediately constructed since the PSD permits for Units 3 and 4 have expired. New hearings will have to be held on these units, if and when LG&E elects to construct them. The General Counsel's opinion directs me to only consider those issues which are relevant to Units 1 and 2. Since the EIS addresses all four (4) units as an environmental whole, I see no way to distinquish which issues apply to any particular unit, nor have any of the parties suggested that such an exercise should or could be accomplished. Consequently, I find the General Counsel's discretion in this regard to be of little or no value.

STV argues that the EIS projected an increase in peak demand for 1978 of 4.7 per cent and although the EIS was not published until October of 1978, EPA ignored available data that indicated only a 2.4 per cent increase for 1978. STV further argues that available data also refute projections made in the EIS for the years 1976 and 1977.

STV states that since the EIS was based on four (4) units, siting options for a facility of less than that were ignored. STV then posits the notion that inasmuch as future power demands were unrealistically inflated, the EIS is flawed since the need for the facility in the first instance is the "linch pin" of the EIS process. STV points to LGE's allowing the PSD permit for Units 3 and 4 to expire as support for its contention that LGE did not really need all that power in the first place. That being the case, STV argues that an EIS based on four (4) units must fail since it did not consider sites for a smaller facility.

In preparing an EIS, the Government must, of necessity, attempt to forecast or predict the future adverse impact of the various environmental consequences of the proposed agency action. These predictions must, of course, be more than mere guesses. An agency must, perforce, choose some well-established technique for making these predictions, whether it be a model for predicting air quality impacts, econometric models for economic and financial impacts, or growth models to determine future energy needs. As stated above, in regard to the choice of air quality models, an agency is vested with broad discretion in picking and choosing among the various options available to it to make these predictions.

Even a cursory examination of the EIS demonstrates that the Agency clearly considered the no-construction option, alternative sites, alternative energy sources, postponing the project and design alternatives. (See pp. 3-8 to 3-39 EIS.)

Early in the process, LGE submitted to EPA a study setting forth the forecasting assumptions and methodology by which it determined its need for the proposed facility. This study was reviewed by the EPA, an independent consultant and the Federal Power Commission. These reviews concluded that the methodology, forecasting techniques and the results obtained were reasonable. Additionally, the U.S. Department of Energy reviewed LGE's generation reserves and concluded that it would be "imprudent to force cancellation of the Trimble County units". (EIS at 5-62.)

The fact that predictions made in 1976 as to power demands into the next century did not precisely coincide with actual power demands in 1977 and 1978 does not, in my judgment, render the EIS legally defective. This is especially true since the discrepancies in the predictions were pointed out to the Agency by numerous commentors, and the Agency responded to them in the EIS. (See pp. 5-3, 5-4 EIS.) It is therefore clear that the Agency was aware of the current situation and considered all variables in deciding to permit the project. This decision was not arbitrary or capricious given the uncertainties of our times in terms of the economy and energy need fluctuations.

As pointed out in *Vermont Yankee*:

> "Administrative consideration of evidence. . . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add the time the decision is judicially reviewed]. . . . . If upon the coming down of the order litigants might demand rehearing as a matter of law because some new stance has arisen, or some new trend has been observed, some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."

The Agency carefully considered all relevant data before it in making its decision. They additionally reevaluated their data in response to comments from the public and were still of the opinion that the facility is needed. The fact that others, including experts, may disagree with that decision is of no moment unless it can be demonstrated that such decision was clearly arbitrary or capricious. *Life of the Land v. Beinegar*, 485 F.2d 460. No such showing has been made here.

I similarly find no merit in the argument that since only two (2) of the original units are immediately planned for construction, the EIS is defective for not discussing smaller sites. LGE has not abandoned its plans for ultimately constructing the other two (2) units. The question of alternative sites was discussed in great detail in the Draft EIS and the Final EIS (pp. 12-15 Draft EIS and 2-3 EIS). The EIS was based on the assumption that four (4) units will be built and did so effectively. No proof has been suggested that ultimately four(4) units will not be built there. An EIS need not discuss unlikely eventualities or evaluate future options that are unrealistic. *National Helium v. Morton*, 486 F.2d 995. Only a reasonable discussion is required, not perfection.

THE UN-ENFORCEABLE STIPULATION

Even though STV adopted three (3) of the EPA rephrased issues for purposes of their motion for summary determination, the topic hearings in their brief are not similar to the language in those articulations. Issue No. 4 by EPA talks about whether or not the EIS adequately addressed the adverse evnironmental impacts of disposal of sludges from the flue gas desulferization (FGD) devices. STV apparently feels this refers to the stipulation, which among other things requires a thirty (30) day supply of low sulphur coal to be kept on the site for use during FGD malfunction. I will apply a broad interpretation of the EPA Issue No. 4, so as to include it in the stipulation question.

The FGD technique which LGE has elected to use generates vast quantities of a nasty sludge that must be disposed of in some fashion. They have proposed to dispose of this waste in a large valley adjacent to the facility. EPA knows the nature of this sludge and its chemical components were described in great detail in the EIS. (See pp. 3-55, 3-56.) LGE plans to line its initial sludgeponds with an impermeable clay layer and subject the sludge to a chemical stabilization process which will make it less likely to leach out into the ground waters and substrata of the valley. This whole matter was exhaustively discussed in the Draft EIS, the EIS and public hearings held on the permit. Test borings were made to study the substrata, test wells will be sunk to monitor any potential leaking of sludge liquors into important acquifers. The State of Kentucky, which administers its own solid waste disposal program, has required constant monitoring and relation of the disposal site if the planned mitigation measures do not work.

Despite all this, the EPA and LGE entered into a stipulation in September of 1978, in which IGE agreed to demonstrate to the EPA the efficacy of its sludge disposal plan if it could not do so, would come up with a new plan at a new site. This new plan would be subject to a complete Environmental Impact Anaylsis (EIS) prior to its execution. The stipulation also required LGE to keep a thirty (30) day supply of low sulphur coal on hand in the event of FGD malfunction and other requirements concerning the proposed transmission line construction.

This stipulation was, on its face, entered into for the following reasons:

> "The EIS identified potentially unacceptable environmental impacts in the form of future contingencies. The stipulations set forth below were developed pursuant to EPA's authority and responsibility under the Act and under NEPA. It is understood by both parties that *this stipulation has been entered into*

> *for the purposes of preventing or minimizing potentially adverse environmental impacts identified in the EIS and for the purposes of obtaining EPA's recommendation to issue the permit.*"

This stipulation was touted by EPA to a concerned Trimble County citizen, as a "legally binding pre-condition" to the NPDES permit. The writer concluded his letter by saying that:

> "I believe that the conditions imposed by EPA and agreed to by LGE provide adequate safeguard against our uncertainty on this issue." *

Obviously at this point in time, the EPA felt that the stipulation was enforceable and was an integral part of the Agency's decision to issue the permit. The stipulation was made a part of the EIS as Appendix D and an earlier version was included in the Draft EIS. Despite this scenario, the EPA has now concluded that the stipulation is un-enforceable by it or any aggrieved citizen. When this fact was brought out in the Sixth Circuit case, mentioned above, the EPA brushed it aside by saying, with some arrogance, I feel, that:

> "If agreements made in an EIS have never been enforceable, then an EIS cannot be declared invalid for failure to discuss that obvious un-enforceability. Similarly, the EIS is not invalid because of failure to emphasize the un-enforceability of its stipulation." (EPA Brief p. 40.)

The obvious problem with that statement is that the issuing authority and the general public thought it *was* enforceable. LGE and EPA now defend by saying, in effect, well it does not really matter whether the stipulation is enforceable or not since the Clean Air Act, the Clean Water Act and the Resource Recovery Act all re-

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* R. 143, letter of October 27, 1980.

quire LGE to abide by it in any event. If so, why did EPA and LGE enter into it in the first place? The stipulation itself says that it was entered into for the purpose of obtaining EPA's recommendation to issue the permit and that it was to assure mitigation of potentially adverse environmental impacts identified in the EIS.

To now argue that no one really needed it in the first place simply will not wash. Its terms were referred to in the EIS as a response to citizens concerns about sludge disposal. It was used to allay public fears about potential adverse impacts. Either the EPA and LGE knew at the outset that the stipulation was un-enforceable and merely used it as a device to con the public or they really felt it would cure future environmental problems with the project and was a necessary element of permit issuance. The first, if true, is irreprehensible, and the latter an honest mistake which nevertheless casts grave doubts on the adequacy of the EIS.

NEPA is not only a "full disclosure" statute in that it requires the Government to consider and discuss all required issues, the agency's rationale for its ultimate decision must also be spelled out. Both the reviewing courts and the public have a right to know the agency's thought processes, how it went about weighing and balancing all the opposing interests, impacts and benefits.

The record before me indicates that: (1) EPA would not have issued the permit absent the stipulation, (2) EPA believed the stipulation to be a binding and enforceable committment by LGE, and (3) EPA relied on the stipulation as a means of mitigating certain potential unacceptable adverse environmental impacts.

An EIS must stand on its own and the after-the-fact arguments of counsel, no matter how cleverly couched, cannot add to or detract from the record upon which the Agency purportedly made its decision. LGE and EPA obviously take this position since they move for summary determination on all issues without a hearing.

In essence then, it must be concluded that the existence of an assumed-to-be enforceable stipulation played an important part of EPA's decision-making process which is embodied in the EIS. That being the case, the EIS must be found to be inadequate since one of its essential underpinnings has been washed away in the tide of conflicting opinion.

This conclusion, however, does not necessarily mean that the project must cease and the defect identified is incurable. Let us assume that I remanded back to EPA for corrective action. The Agency would simply issue a modified permit, including in its terms, the language of the stipulation, advertise the modification, have another public hearing and issue a modified permit. All of this would take time, taxpayers' money and necessitate the expenditure of additional sums of money by STV, other concerned citizens and LGE to no particular purpose. I can accomplish the same result at no cost. 40 C.F.R. 122.66(c)(3), 45 *Fed. Reg.* 33453, May 19, 1980, permits the Regional Administrator to place conditions in a new source NPDES permit based upon his/her evaluation of the EIS. I have the same authority. I realize that I have previously ruled that the permit issuing portions of the new regulations do not apply to this case. However, I can make them applicable if I find it appropriate to do so to carry out the purpose of the Clean Water Act and when no party would be unduly prejudiced thereby. (40 C.F.R. § 124.86(c).) Clearly to have applied them retroactively to the LGE permit and, in essence, declare the permit invalid after its final issuance would have severely prejudiced LGE.* To apply the new rules to the present situation will prejudice no one, if one assumes that STV's true concerns are the inadequacy of the EIS and not just a ploy to temporarily delay the project which will most likely proceed in any event. (Unless, of course, the Ad-

* Such action would also have been contrary to the rulings of the OGC and the Sixth Circuit, which are binding on me.

ministrator or the courts reverse this decision.) I therefore propose to amend the permit by incorporating therein the terms of the stipulation. This will cure the defect alluded to above by making the permit's terms consistent with the rationale expressed in the EIS. In passing, I should note that I find the case of *North Slope v. Andrus*, No. 80-1148 (D.C. Circuit), cited to me by LGE, not to be applicable to this case since no one was questioning the enforceability of the stipulations in that case.

THE REMAINING ISSUES

Issue (f) questions the validity of EPA's assumption that the FGD device proposed to be installed by LGE will achieve ninety (90) per cent efficiency, which assumption was utilized by EPA in the air quality modeling exercise.

In the first place, the whole subject of sulphur dioxide control was discussed and thoroughly considered by EPA in both the Draft and Final EIS. See pp. S-121, 131 EIS. EPA acknowledged that many utilities have experienced problems with these devices in the past, in terms of efficiency and reliability. EPA has commissioned numerous studies of these devices and published the results thereof over a period of many years. The EIS points to improvements in their reliability in recent years and EPA has have officially sanctioned their use in numerous instances. The Congress has also examined this question and endorsed their use in its House Report on the Clean Air Act Amendments of 1977. The courts have also rejected the notion that one-hundred (100) per cent reliability must be demonstrated prior to mandating the use of these devices. *U.S. v. West Penn Power Company*, 460 F.Supp. 1305 (1978).

If there was ever a clear case of the exercise of an agency's expertise in deciding a complex issue, this is it. This is one of those instances where a court would not sub-

stitute its judgment for that of the agency. The use of these devices was fully discussed as were their potential problems. The full disclosure and hard look required by NEPA has been accomplished. EPA's decision in this regard was not arbitrary or capricious.

Issue (i) suggests that EPA's reliance of further study and control by the State of Kentucky was an unlawful delegation of EPA's duty to consider the environmental effects of the sludge disposal scheme. The EIS discussed the potential problems associated with sludge disposal in the valley. It also stated that the nature of the problem posed questions that are not scientifically capable of being answered at this time, because of the fact that no one can know precisely the exact nature of the underlying rock strata. The fact that the State of Kentucky, which has solid waste disposal authority, will monitor the effects of this disposal method to insure its success or mandate alternative sites in no way detracts from the adequacy of the EIS. As stated in *Sierra Club v. Morton, supra*:

> "What we hold today is that where shortcomings in a major federal action can be corrected or minimized when and if they surface, the EIS upon which such action is authorized may meet NEPA's objectives with some less detail and analysis than would otherwise be required."

The court in *Morton* also sanctioned the use of state action to control adverse environmental impacts that may occur in the future.

The EIS full considered the problems associated with sludge disposal and the Agency's decision to allow the project to proceed in light of the stipulation and the State's ability to control future problems can not be said to be arbitrary or capricious. For additional authority for this methodology, see 40 C.F.R. G.924(c)(4) and 40 C.F.R. 1502(f).

In Issue (n) STV questions whether the EIS gave adequate consideration to the potential effect of accidental spills of toxic substances during barge unloading operations. The Draft EIS recognized that such spillage could occur and acknowledged the fact that such occurrences could result in deterioration of the River's water quality, depending on the amount and duration of the spill. (See p. 6-76.)

Mitigative measures to address this eventuality were discussed at p. 7-3 of the Draft EIS. They include the use of floating booms, motorized oil skimmers and the construction of dikes around the oil tanks with a capacity equal to 110 per cent of the largest tank. Applying the *Rule of Reason* enunciated in *County of Suffolk v. Interior*, S62 F.2d 1375 (1979), I can not say that the EIS failed to adequately address this issue.

Issue (p) asks whether the EIS adequately addressed the adverse effects of "soot-blowing" associated with safe and efficient boiler operation. The EIS apparently did not address this question. The practice of "soot-blowing" is well recognized in the field of air pollution control and is addressed in the air pollution regulations of every state in the Union. It involves a periodic and short-term blowing of the soot and particulate particles from the heat exchanger tubes in a boiler to insure safe and efficient operation of the boiler. Accumulation of soot deposits on the tubes interferes with the ability of the heat exchanger to perform its designed function. It can also cause build-up of hot spots in the heat exchanger which can lead to their failure causing serious damage to the equipment, and it is dangerous to the operators.

The effect of this practice on air quality is truly *de minimus* and the failure of the EIS to address it is not fatal in its adequacy. The air pollution regulations of the State of Kentucky limit this practice to a very short duration in a given time period. The EPA has approved this regulation and knows of its existence. An EIS need not

address every conceivable environmental impact but only those of importance and significance. *EDF v. TVA*, 492 F.2d 466 (1974).

Issues (u) and (v) question the use of data generated by Fluor Pioneer, a LGE consultant, in the EIS and whether or not Dames & Moore, a third party consultant of EPA, had sufficient independence and objectivity to adequately perform its functions on the EIS. This precise issue was addressed in *Life of Land v. Brinegar, supra*, wherein it was alleged that the EIS was flawed because a private consulting firm (Parsons), which had a financial interest in the project, prepared the EIS. In disposing of this contention, the court held that:

> "It does appear from the record that Parsons has a financial interest in an affirmative decision on the proposed project. We find nothing, however, in either the wording of NEPA or the case law, which indicates that, as a matter of law, a firm with a financial interest in the project may not assist with the drafting of the EIS. As the Eighth Circuit has indicated, compliance with section 102 of NEPA is based upon good faith objectivity rather than subjective impartiality. *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 296 (8 Cir. 1972), aff'g, 342 F.Supp. 1211 (D. Ark. 1972). See also, *Sierra Club v. Froehlke*, 359 F.Supp. 1289, 1342 (S.D. Tex. 1973).
>
> "While Parsons may have assisted in the EIS' preparation, the significant and active participation by the F.A.A. therein precludes us from concluding that there was any improper or illegal delegation in this case."

I find no reason, in this case, to disagree with that conclusion, given EPA's preparation of the EIS and its independent consideration of all relevant impacts discussed therein.

Issue (w) asks whether the EIS adequately considered the air quality impacts which would result from long-term scrubber (FGD) malfunction and exhaustion of the low sulphur coal required, by the stipulation, to be maintained on the premises.

In my judgment, an EIS need not identify what the Agency would do if the owners of a project elect to violate the law. One assumes that the owner will comply with all applicable laws incident to its operation of the subject facility. Obviously, the Agency will prosecute the owner if it fails to meet the permit limits. Although not required to do so, the EIS does address this eventuality on p. 5-124, wherein the Director of EPA's Division of Stationary Source Enforcement discussed what EPA would do in the event of "upset" or "malfunction".

Issue (w) is not really an appropriate issue for consideration in evaluating the adequacy of an EIS. Even if it were, the EIS adequately considered the point.

CONCLUSION

I have studied the issues raised by STV and have tried to determine which ones were fairly included in the EPA consolidation of them into four (4) broad statements. The discussion above entitled, "The Remaining Issues", identified those issues which I felt may not have been addressed in that consolidation. I am, therefore, of the opinion that I have addressed all issues raised by STV and the other parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon consideration of the entire record before me and the briefs and arguments of counsel, the following findings are made:

1. The matters set forth in factual background and discussion of issues are adopted as findings of fact.

2. The EIS prepared by the EPA, concerning the subject project, fully complies with the requirements of NEPA.

3. The motions of LGE and EPA for a summary determination on all issues raised by STV and the other parties are granted.

4. Since this opinion decides all factual and legal issues raised by the parties, it constitutes an Initial Decision pursuant to 40 C.F.R. § 124.89, and as such represents final Agency action within thirty (30) days of its service upon the parties unless a petition for review is filed or the Administrator files notice that he intends to review the decision *sua sponte*, purusant to 40 C.F.R. § 124.91.

ORDER

The permit heretofore issued by the Agency to LGE shall be modified to include the terms of the stipulation entered into between LGE and EPA on October 27, 1978, which is set forth as Appendix D to the Fnal EIS, and issued to the permittee.

/s/ T. B. Yost
THOMAS B. YOST
Administrative Law Judge

DATED: December 8, 1980

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C.

NPDES Appeal No. 81-3

IN THE MATTER OF:

NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM PERMIT FOR

LOUISVILLE GAS & ELECTRIC COMPANY
TRIMBLE COUNTY POWER PLANT

NPDES No. KY0041971

Final Decision

Save the Valley, Inc. (STV) appeals from an initial decision, dated December 8, 1980, in which the presiding officer, Administrative Law Judge Thomas B. Yost, granted motions for summary determination filed by Louisville Gas and Electric Company (LG&E) and Region IV of the Environmental Protection Agency (EPA). LG&E and EPA sought a summary determination that an environmental impact statement (EIS) prepared by EPA under the terms of the National Environmental Policy Act (NEPA) fully satisfied the requirements of that statute in connection with the issuance of a National Pollutant Discharge Elimination System (NPDES) permit to LG&E for a power plant it proposed to construct in Trimble County, Kentucky. The power plant was to consist of four units having a combined electrical generating capacity of 2340 megawatts.

STV challenged the adequacy of the EIS and by cross-motion sought a summary determination in its own favor. In its original request for a hearing and in its cross-motion for summary determination, STV raised a number of issues and asserted numerous reasons why it believed the EIS was deficient. On appeal from the initial de-

cision, however, STV confines its allegations of inadequacies in the EIS to the issue of whether, as required by § 102(2)(C) of NEPA, EPA gave adequate consideration to the need for and alternatives to the facility. Specifically, STV argues that the EIS is defective for failing to include and give consideration to data on actual demand for electricity during the summer of 1978. The EIS was released to the public in final form on October 20, 1978, and STV contends the data from the summer of that year were available to EPA, that the data should have been considered by EPA and that such consideration would have shown that there was no need for a power plant of the size proposed by LG&E. According to STV, a much smaller plant or possibly none at all might have been deemed sufficient to meet future demand for electricity had the 1978 data been considered. In addition, if future demand for electricity could be satisfied by a smaller plant, EPA could have then given consideration to other sites for locating the plant which were either rejected or not considered in the EIS because they were not large enough to accommodate a plant of the size proposed by LG&E. The presiding officer dismissed these contentions in the initial decision, and STV argues on appeal that the presiding officer erred.

In addition, STV also argues that the presiding officer committed procedural error in reviewing the EIS. The presiding officer reviewed the EIS applying an "arbitrary and capricious" standard of review, as would a reviewing court. STV contends that he should have placed himself instead in the role of the Agency's final decisionmaker and, as such, decided independently whether, in light of the issues raised by STV and the consideration given those issues in the EIS, the NPDES permit should be issued.

For the reasons stated below, I conclude that the standard of review which the presiding officer adopted was in error; however, because it is evident from his initial

decision that he did in fact make an independent assessment of the record before him, there is no need to remand this proceeding for the taking of further evidence on the matters disposed of in the initial decision which are not specifically addressed in STV's appeal. With respect to the matter which STV does specifically address in its appeal, namely, EPA's failure to give consideration to data on actual demand for electricity during the summer of 1978, I conclude that EPA was not under any obligation to consider the data.

Standard of Review

A court reviewing an agency's compliance with NEPA will not overturn the agency's decision unless it is arbitrary and capricious. The Supreme Court has ruled that the duties NEPA imposes on Federal agencies are "essentially procedural." *Strycker's Bay Neighborhood Center v. Karlen*, 440 U.S. 223, 227 (1980), *quoting Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). Thus, while NEPA establishes important substantive goals for improving the quality of the human environment, Federal agencies are not required to "elevate environmental considerations over other appropriate considerations," and as a consequence, a court "cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' *Kleppe v. Sierra Club* [infra]." *Id.* In other words, the role of the court is to ensure that the agencies have carried out the mandate of NEPA "to insure a fully informed and well-considered decision" but "not necessarily a decision the judges . . . would have reached had they been members of the decisionmaking unit of the agency." *Vermont Yankee Nuclear Power Corp.* v. *NRDC, supra* at 558. As a consequence, a court will not substitute its judgment for that of the agency in deciding whether the environmental consequences of authorizing a particular project are or are not outweighed by other appropriate considerations. *Kleppe v. Sierra Club*, 427 U.S. 309, 410, n. 21 (1976).

The presiding officer felt that he too was not empowered to substitute his judgment for that of the Agency insofar as the permit issuer's EIS determination was concerned. He reasoned that the "arbitrary and capricious" standard of review, which is imposed on the courts by the terms of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, is there because "Congress has left to the various agencies the power to make policy decisions and exercise discretion based upon their expertise and knowledge involved in administering the statutory program in question." Decision at 9. He then concluded that, like a court, he had no particular expertise to bring to the complex task of deciding whether the environmental consequences of authorizing a particular project are or are not outweighed by other appropriate considerations.

> "As an Administrative Law Judge (ALJ), am I the Agency? Do I possess this expertise? May I substitute my judgment for that of the Agency? I think not. It is apparent that the Agency, in promulgating the regulations giving persons a right to a hearing on NEPA and EIS issues, have not thought the process through. No agency policy or regulation provides guidance on this question. Logic, however, would tend to dictate the futility of my reviewing final Agency action on a *de novo* basis, making independent determinations concerning whether a particular environmental consequence is so heavy as to outweigh any benefits, when a court will review my decision and that of the Administrator using a totally different standard." Decision at 9.

In accordance with this reasoning, the presiding officer then stated his approach to reviewing the Trimble County permit.

> Accordingly, I am of the opinion that my scope of standard of review for this case will follow that established by court decisions relevant to NEPA. I will take a hard look at the Agency's hard look and

> apply the arbitrary and capricious standard of the [Administrative Procedure Act]." Decision at 9-10.

STV argues that by applying the "arbitrary and capricious" standard of review the presiding officer accorded too much deference to the Region's decision to issue a permit for the Trimble County plant. STV contends that the presiding officer, unlike a reviewing court, is in fact part of the decisionmaking unit of the Agency, and thus, he was required to decide, based upon the record before him, whether the relative environmental and other costs and benefits of the proposed Trimble County facility warrant issuance of an NPDES permit to LG&E. In making this decision, STV contends that the presiding officer should have independently determined whether he agreed with the Regional Administrator's decision to issue the permit, and in doing so, he was also free to substitute his judgment for that of the Regional Administrator, if supported by the facts in the record.

These arguments are persuasive. The presiding officer should have reviewed the EIS in the same way a conventional NPDES permit is reviewed, rather than applying the arbitrary and capricious standard used by the courts. In other words, he was mistaken when he concluded that he lacked the authority to review the permit independently or on a *de novo* basis. Decision at 9. The principal difference between the function of the presiding officer in reviewing the permit issuer's EIS determination and that of a court in reviewing the same determination is the simple fact that, as noted by STV, the presiding officer is part of the decisionmaking unit of the Agency, whereas a court is not. The consequences of this distinction do not, of course, mean that the presiding officer is somehow instantly endowed with the expertise needed to substitute his judgment for that of the permit issuer. What the distinction does mean is that the statutory and constitutional restriction which apply to a court and which prevent it from substituting its judgment for that

of the Agency do not apply to the presiding officer. A Federal court is barred from substituting its judgment for that of an agency by the Administrative Procedure Act requirement that agency findings and conclusions can only be set aside by the court if it finds that the agency action was "arbitrary and capricious." 5 U.S.C. § 706. A Federal Court is also barred from substituting its judgment for that of an agency if the exercise of that judgment would require it to perform functions which are "essentially legislative or administrative." *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 469 (1930). Under Article III of the Constitution the courts cannot perform non-judicial functions. See *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923). Therefore, a court cannot substitute its judgment for that of an agency in a decision involving an EIS determination because, as the Supreme Court decisions in *Vermont Yankee* and *Stryckers Bay* made clear, once the procedural requirements of NEPA are satisfied, the remaining functions are essentially administrative.

Since these statutory and constitutional restrictions obviously do not apply to the presiding officer, any restrictions or limitations on his authority to review the permit issuer's EIS determination must necessarily spring from some other source. However, a search of the relevant statutory provisions and regulations fails to disclose any. Instead, the relevant considerations which govern the presiding officer's scope of review in a case involving an EIS are no different from those which govern a conventional NPDES proceeding involving specific terms and conditions of a permit. In both cases § 402(a)(1) is the basic provision of the Clean Water Act under which the proceeding is conducted. There is nothing in § 402(a)(1) which provides for treating the two types of cases differently.[1] In a conventional NPDES proceeding, the

[1] By its terms, § 402(a)(1) simply provides that an NPDES permit may be issued by the Agency after an opportunity for hearing

hearing ordinarily serves as a forum for interested persons, including the permit applicant, to contest the terms and conditions of the permit.[2] In such a proceeding the presiding officer is expected to make and, in fact, does make independent or *de novo* determinations regarding the terms and conditions of the permit based upon the evidence adduced at the hearing. He is directed by the procedural rules to conduct a fair and impartial hearing, to admit all relevant and material evidence, to review and evaluate the record, and to issue an initial decision. *See generally* 40 CFR §§ 124.85 and 89 (1980). By virtue of this authority, it is clear that the presiding officer is also expected to decide any factual or legal issues which are properly raised in the course of the hearing, including, of course, the ultimate issue of whether a permit should be issued or denied, and if it is to be issued, upon what terms and conditions. Moreover, although the rules do not expressly provide that the presiding officer is authorized to decide policy issues arising in the course of the hearing, such authority is necessarily implied.[3] In addition, if the initial decision is not appealed and if the Administrator does not otherwise elect to review it, it automatically becomes the final decision of the Agency. 40 CFR § 124.89(b) (1980). In short, it is clear that the

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and only upon condition that the discharge authorized by the permit meets the requirements of §§ 301, 302, 306, 307, 308 and 403 of the Act.

[2] Typically, if the permit applicant requests a hearing, it is for the purpose of seeking less stringent terms and conditions in the permit, whereas other interested persons typically request a hearing for the purpose of seeking more stringent terms and conditions. If no one requests a hearing, the permit becomes a final permit upon the terms and conditions proposed by EPA.

[3] This implied authority is apparent from the fact that a party appealing the presiding officer's initial decision is required by § 124.91(a)(1)(ii) to show where the initial decision contains "[a]n exercise of *discretion* or *policy* which is important and which the Administrator should review." (Emphasis added.)

presiding officer is empowered to make decisions for the Agency. Therefore, as part of the decisionmaking unit of the Agency, the presiding officer, unlike a reviewing court, is free to substitute his judgment for that of the permit issuer where the facts and circumstances warrant it. The principal limitation on his authority is the requirement that his decision be based solely on the facts appearing of record in the proceeding.

The 1978 Data

There is no dispute that under the terms of § 102(2)(C) of NEPA EPA must give consideration to the need for and alternatives to the proposed Trimble County facility. In this instance, the need for the 2340 megawatt facility was justified in the EIS largely on the basis of a forecast of future demand for electricity within the relevant area where LG&E provides electrical service to its customers. The forecast spanned the period from 1976 to 1990 and was based on a technical analysis of demand for electricity collected from data covering the period from 1965 to 1974. EIS at 3-2. Because the EIS was not finalized until October 20, 1978, EPA was able to test the accuracy of a small portion of the forecast by comparing actual demand for electricity during 1975 and 1976 with the projected demand contained in the forecast for the same two years. In addition, EPA was also able to conduct a preliminary analysis of the 1977 summer load data, and based on that analysis, EPA concluded that the forecast for the summer of 1977 was generally confirmed. EIS at 3-1. Thus, EPA's basis for relying on the forecast rested on a data base of actual demand for a ten year period (1965 to 1974) which was supplemented by data from 1975 and 1976 and by a preliminary analysis of data for 1977. With this information available to it, EPA concluded that an NPDES permit should be issued to LG&E.

STV contends that EPA's assumptions about growth of demand for electricity in the EIS are so flawed that

they must be considered arbitrary and capricious. Specifically, STV contends EPA made no effort to determine whether demand during the summer of 1978 had increased at a rate approaching that predicted in the draft EIS. Had the Agency done so, according to STV, it would have learned that the increase in peak demand during the 1978 cooling season had fallen far short of projections set out in the EIS. According to STV, LG&E's Annual Report discloses that the actual increase in demand in 1978 was only 2.4 percent, in contrast to the growth rate of 4.7 percent projected in the EIS. STV also points out that the increase in demand fell short of predictions in the two preceeding years, thus indicating a trend of declining demand for electricity. The lowest rate of increase in the forecast is 4.1 percent annually and ranges as high as 6.1 percent, yet demand in 1976 only increased by 3 percent and in 1977 it only increased by 1.4 percent. In sum, the rate of increase fell short of annual projections for three consecutive years.

STV's position cannot be sustained. By charging EPA with failing to update the EIS with data from the summer of 1978, STV is seeking to hold EPA to a standard of diligence which is simply not reasonable or required by law. In this instance, the draft EIS was circulated for public comment in early 1978 and the final EIS was released on October 20, 1978. STV nevertheless argues that the EIS is defective for failing to include and give consideration to data which, at the earliest, could not have come into existence until the first days of autumn of the same year. While the parties disagree as to whether the data were in existence prior to the time the final EIS was released, it is safe to conclude that, even if the data were physically available, the timing of the data's availability and release of the final EIS could hardly have been far apart.[4] Furthermore, if a reason-

[4] Of course, if the data were not physically available, then there is no question that the Agency could not have factored the data into the EIS, and therefore, further inquiry into this matter would be unnecessary.

able but nevertheless brief period of time is allowed for transmitting a typed copy of the final EIS to the printer for duplication, any gap between the availability of the data and release of the EIS obviously narrows ever further. The issue thus presented is whether, under the circumstances, the Agency was under an obligation to consider the 1978 summer data before releasing the EIS in final form. The answer, as discussed below, must certainly be no when due consideration is given to the nature of the data, its timing and to all of the surrounding circumstances.

In *Vermont Yankee* the Supreme Court established the principle that an agency's consideration of alternatives to a proposed project must be judged "by the information then available to it." *Id.* at 553. The question before the court was whether the Nuclear Regulatory Commission [NRC] erred when it failed to consider "energy conservation" as an alternative to constructing a nuclear electrical generating station. At the time the matter was before the NRC, not much was known about energy conservation. The Supreme Court took that fact into consideration and refused to hold that NEPA placed any obligation on the NRC to consider alternatives which were poorly understood; in other words, it looked at "the historical setting" in which the NRC made its decision before passing final judgment on the adequacy of the EIS. *Id.* The Supreme Court also recognized that in certain instances new information must be brought to the agency's attention before the agency is under an obligation to consider it. Thus, even though the court held that NEPA places upon an agency the obligation to consider "every significant aspect of the environmental impact of a proposed action," it also held that those wishing to participate in the process have an obligation "to structure their participation so that it is meaningful, so that it alerts the agency to [their] position and contentions." *Id.*

These statements by the Supreme Court plainly indicate that an agency's actions under NEPA are to be

measured against standards of reasonableness and that due regard must be given to all of the surrounding circumstances. In other words, the principle that an agency's actions are to be judged "by the information then available to it" refers to information that is *reasonably* available to the agency, taking into account its materiality and the setting in which it is supposed to have come to the agency's attention. Therefore, when these principles are applied to the present controversy involving the Trimble County EIS, it is unreasonable to conclude that EPA's Regional officials failed to give adequate consideration to the need for and alternatives to the 2340 megawatt facility because data on actual power demand during the summer of 1978 was not factored into the EIS. In the setting in which the EIS was released, there was little if any reason for the Agency to believe that the data had the significance which STV now seeks to attach to them. The fact that data on actual power demand for the first two years of the forecast showed discrepancies is hardly a sufficient basis for discrediting the entire forecast. As the presiding officer observed: "The fact that predictions made in 1976 as to power demands into the next century did not precisely coincide with actual power demands in 1977 and 1978 does not . . . render the EIS legally defective." Decision at 14. In fact, given the nature of forecasts in general and the scope of the Trimble County forecast in particular, such discrepancies are probably the rule rather than the exception. In any event, when the draft EIS was released in early 1978, it was certainly foreseeable by everyone that another summer season's data would be available for consideration if the issuance of the EIS were delayed or postponed; however, none of the comments received from the public, including those received from STV, provides any reasonable basis for alterting EPA to the possibility that there was any compelling need to postpone the final EIS in order to consider one more summer season's data. STV in its written comments did

indeed contend that the projections contained in the EIS were too high, but the basis for STV's contentions did not signal any need to postpone the EIS until after the summer data could be gathered and analyzed. Instead, the basis for STV's contentions rested on other grounds, and those grounds were given full consideration in the EIS. For example, in response to comments received from STV, the Agency requested the Department of Energy (DOE) for assistance, and DOE responded in a memorandum dated August 25, 1978, by stating that "it appears imprudent to force cancellation of the Trimble County units" in view of the projected electrical reserve margin requirements for the region of which LG&E is a part. EIS at 5-62. Therefore, when all of the surrounding circumstances are taken into consideration, the data for the summer of 1978 were not reasonably available to the Agency before the final EIS determination was made. As a consequence, the EIS is not defective for failing to include and give consideration to the data, and the Agency's consideration of the need for and alternatives to the Trimble County facility is not thereby rendered inadequate.

Conclusion

For the reasons stated herein, the order entered by the presiding officer which grants summary determination in favor of LG&E and EPA is affirmed.

So ordered.

/s/ Ronald L. McCallum
RONALD L. MCCALLUM
Judicial Officer

Dated: Sep. 24, 1981